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November 10, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: May 24, 2005

Case Number: TSO-0249

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. As discussed below, I find that access authorization should not be restored in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the notification letter included a statement of the derogatory information causing the security concern.

The security concern cited in the letter involves the individual's alleged sexual molestation of his step-granddaughters and a stepdaughter. Furthermore, according to the letter, the individual

1/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

admitted during a personnel security interview (PSI) that he had confessed to these actions, but had explained that he had only done so in order to prevent his wife from coming to his work site and making his co-workers aware of these claims. These allegations represent a concern under 10 C.F.R. § 710.8(l)(Criterion L), which pertains to reliability, trustworthiness, or circumstances which tend to show that an individual may be subject to pressure, coercion or exploitation.

The notification letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual was represented by an attorney. He testified on his own behalf, and presented the testimony of his son (son).² The DOE Counsel presented the testimony of one of the step-granddaughters (step-granddaughter or accuser), her mother (mother), her father (father), and her aunt (aunt).

II. Hearing Testimony

A. The Individual

The individual denied having had any inappropriate relationship with his step-granddaughter.³ He asserted that she had a pattern of lying, and was an undisciplined teenager whose parents could not control her. He further maintained that the other witnesses

2/ Due to a medical emergency, the son was forced to leave the hearing site prior to testifying. Accordingly, I took his testimony by telephone several weeks later, during a second segment of the hearing.

3/ During the hearing there was a considerable amount of testimony devoted to the issue of whether the individual confessed to the molestation during a taped telephone conversation with his wife. The tape was purportedly destroyed. Tr. at 66-76. In order to reach a result in this case, I need not determine whether the individual did confess. I will assume for purposes of this proceeding that he did not confess.

brought forth by the DOE counsel were lying. He contended that the step-granddaughter's reason for accusing him of the improper actions was because she wanted to marry her boyfriend, by whom she had become pregnant. The individual maintained that his step-granddaughter believed that by raising the falsehoods about him, she could deflect her parents' attention and anger away from herself and her out-of-wedlock pregnancy, and onto him, thereby convincing her parents to permit her to marry her boyfriend. ⁴ He argued that the fact that he was never charged criminally and further that the step-granddaughter's family failed in a civil suit brought against him for the alleged molestation demonstrates that her charges were false. He maintained that it was the goal of the step-granddaughter's family to extract money from him through the civil charges. Transcript of Hearing (Tr.) at 145-177.

B. Step-granddaughter

The step-granddaughter is now 23 years old. She has two children and is a housewife, supported by her husband. Tr. at 7-8.

She testified that she had fondled the individual at his request, and that the individual had fondled her and exposed himself to her. She said that she could remember incidents beginning when she was about nine or ten years old, but suggested that the incidents could have begun earlier. Tr. at 9-10.

She was not sure how many incidents took place. She described in some detail when and how these incidents would occur. Tr. at 12. She indicated that when she was young, while her parents were at work, she was often left after school in the care of her grandparents. Tr. at 14. It was during these times that the molestation incidents often took place. She testified that it was hard for her to "get away" from the individual, since she was "in his care." She also stated that "when growing up, it was always that you had to respect him and you had to mind him. . . .I was always brought up that you respect . . . your elders. . . . what do you do. . . . Do you defy him?" Tr. at 42-45. She indicated that the incidents came to an end when she was about 16 years old, was able to drive, and could therefore control her own schedule. Tr. at 13.

4/ Both the step-granddaughter and her boyfriend were underage at the time of the revelation, and could not marry without parental consent. Ultimately, the step-granddaughter received parental permission, and did marry her boyfriend.

She stated that she was afraid to reveal the incidents to her parents during the time they were taking place because the individual told her he had to support her grandmother, and it would "tear up" the family if she revealed his actions. Tr. at 10. She indicated that in 1999, while she and her boyfriend were discussing the possibility of marriage, she revealed the molestation incidents to him. Shortly thereafter, she told her mother, at which point the events became known to the entire family. She denied having "made up" the incidents in order to convince her parents to let her marry her boyfriend. Tr. at 8-19, 43.

The step-granddaughter denies that she had any serious behavioral problems as a teenager, but she admitted some rebelliousness, including disobeying curfews, using the telephone excessively, refusing to follow her parents rules, and lying to her parents about where she was going. Tr. at 19-20, 28, 36, 42.

C. The Accuser's Mother

The accuser's mother stated that she believed her daughter's accusations regarding the individual were true. She recounted in detail the circumstances during which her daughter revealed the molestation incidents to her. According to the mother, it was a highly emotional event. She stated that her daughter was uncontrollably "sobbing." She never questioned her daughter's honesty on this matter, testifying that, "She was too sincere." Tr. at 89.

The mother testified that her daughter had some instances of "typical teenage rebellion." Tr. at 52. She stated that there were disagreements about her curfew, and some untruthfulness about long distance phone calls and about where she went and whom she was with after school. Tr. at 83. However, overall, she believed this was no different from other "teenagers I had ever been around." Tr. at 52.

She stated that she was disappointed by her daughter's pregnancy, but that there was no significant "confrontation" which might have prompted her daughter to try to deflect attention from herself onto the individual. She testified that within a few weeks, she welcomed the boyfriend back into their home. She had some conversations with him, and was satisfied that the boyfriend was serious and responsible. Within several months she decided to allow her daughter to marry him. Tr. at 55-58.

D. The Accuser's Aunt

The aunt indicated that she knows the accuser well, and testified that the accuser has never lied to her. Tr. at 128. The aunt found the step-granddaughter's accusations believable. She stated that she, too, had several encounters with the individual that were inappropriate. She indicated that on several occasions she was awakened in her bedroom, and found the covers on her bed were lifted. She testified that she became concerned, and therefore began to lock her bedroom door at night. She stated that thereafter, she would be awakened in the middle of the night when her doorknob was being rattled [as if someone were trying to enter]. Tr. at 126.⁵ She then recounted one occasion on which "he grabbed me and he kissed me. . . . he had both his arms wrapped around me and he was trying to kiss me, his lips were on mine and he was pressing. I shoved him back and ran." Tr. at 127. She also testified that her own daughter was molested by the individual. Tr. at 130-34. See also DOE Exh. 12.

D. The Accuser's Father

The father stated that the accuser was a typical teenager. While he admitted she was involved in one instance of lying about a telephone bill and had a "slapping" incident with her mother, he thought she was generally truthful and did not get into trouble. Tr. at 105, 106, 116. He testified that the accuser's revelations regarding the individual bore no relationship to the decision to allow the accuser to marry her boyfriend. Tr. at 110.

E. Individual's Son⁶

This witness testified that from 1987 through 1989, he used to see the step-granddaughter about twice a month at weekend family gatherings. He believed the step-granddaughter's accusations regarding molestation were false. In his view, the accuser was not

5/ In this regard, the individual stated that he was attempting to open her locked door in order to let heat into her bedroom. He further indicated that he adjusted her blankets in order to "cover her up." Tr. at 155. This admission by the individual tends to reinforce the overall credibility of the aunt.

6/ This witness testified at a second segment of the hearing in this case. References to the transcript of this segment of the hearing will be cited as Tr. II.

a truthful person. However, he could not give an example from his own knowledge of any untruths that the accuser told. He stated that he leaves his own two young daughters (ages 9 and 11) alone with the individual from time to time for periods of about 30 minutes, while he goes to the hardware store or the grocery store. He further testified that he never observed any inappropriate behavior by his father towards the step-granddaughter. Tr. II at 5-24.

III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) ("the clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990)(strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

In this case, the individual's focus has been on impugning the credibility of the accuser. He has tried to portray her as having a history of lying and as an unruly, undisciplined teenager.

He also contends that the fact that no criminal charges were brought against him and the fact that the accuser did not prevail in the civil suit, show that there is no truth to her accusations.

The individual has also proffered motivations for the step-granddaughter's accusations. He claims that she was hoping to deflect attention away from her pregnancy and to attempt to obtain her parents' consent to marry her boyfriend. The individual further maintains that the accusations were part of a scheme to extract a monetary settlement from him.

As indicated above, once a security concern has been raised, it is the burden of the individual to persuade the DOE that he is entitled to hold an access authorization. The individual must therefore bring forward sufficient information to mitigate or resolve the security concerns, including appropriate support. Usually, this will include corroborating witnesses and/or documents. As discussed below, the individual has brought forward little information to corroborate his position.

Accuser's Credibility

The individual's attempt to impugn the credibility of the step-granddaughter falls short. His approach was first to show some inconsistency between her court testimony in the civil suit that her family brought against him and her pre-trial deposition. The subject of the alleged inconsistency was the exact nature and frequency of the molestation events.

This does not convince me that his step-granddaughter's accusations are false. First, even if there were some inconsistencies in her statements as to the exact number of incidents or the precise nature of the molesting acts, I find there was a fundamental believability about the step-granddaughter's accusations. Recognizing that she was referring to incidents that took place 10 or more years ago, I did not find the small inconsistencies establish that as a whole her claims were false. I observed her overall demeanor carefully, and found her to be serious and sincere.

The individual also alleged that the accuser was generally an untruthful person. However, I was not particularly impressed by the individual's testimony about why he believed this to be so. He was

questioned regarding his assertions that his step-granddaughter was a liar and an uncontrollable teenager who had serious altercations with her parents. When asked for examples of her lies, he stated that he saw her in one place when she had told her parents that she would be in another. He stated that she lied about whether she had incurred a large telephone bill, and during one argument had slapped her mother. These incidents appear to be sporadic, rather insignificant examples of teenage rebellion, and do not seem to me to support a claim that the accuser was overall an untruthful person or had an untruthful character. These examples are not of such a pervasive, ongoing nature to convince me that the step-granddaughter would fabricate the very serious molestation charges at issue here.

I was also not impressed by the testimony of the individual's son regarding the credibility of the accuser. This witness seemed to know very little about her. For example, he testified that he saw the accuser and the individual together about twice a month at family gatherings during the period 1987 through 1989. When he was asked to describe how the individual and the accuser related to each other at those gatherings, he could not be specific. He was asked to describe what the individual and the accuser talked about. After some considerable hesitation, he said they talked about TV shows. Given the fact that the accuser was approximately four or five years old at that time, I find this assertion not especially believable, and his memory about the accuser not particularly reliable. In any event, he could not testify about a single event in which the accuser actually lied to him or about any incidents that he knew about from his own experience in which the accuser actually lied. Tr. II at 11-12. Further, since his most frequent contact with the accuser was when she was just a child, I believe he did not have a chance to get to know her as a teenager, when the truthfulness of her character becomes an issue. I therefore find that this witness was not a particularly knowledgeable one.

The individual has brought forward no other witnesses to corroborate his view that the accuser was lying and that she has often lied in the past. He has asserted that his wife believes him on this issue. Tr. at 160-63. He made several other assertions recounting purported statements by his wife to the effect that she believed that the accuser was a liar. *E.g.*, Tr. at 176. However, he did not bring forward his wife to testify at the first segment of the hearing to corroborate his assertion. He gave as a reason that she "does not want to get upset. . . ." Tr. at 163-64. I stressed to him that it was important for his wife to corroborate his statement that she believes him, and I invited him to have her testify at the second segment of the hearing. Tr. at 187. The individual failed to bring his wife forward.

I further invited him to bring forth at the second segment of the hearing any other witnesses who had knowledge about the accuser's propensity to lie, and about why they believe that the accusations are false. Tr. at 188. The individual failed to do so. ⁷

On the other hand, I have credible testimony that corroborates the accuser's allegations. Her mother, aunt and father, all supported her accusations. In this regard, the accuser's aunt testified credibly that she, too, was inappropriately kissed by the individual.

The Accuser's Motivation

The individual has not provided any convincing reason the accuser would fabricate the molestation story. I am certainly not persuaded by the individual's assertion that the accuser wanted to draw attention away from herself due to the pregnancy. Attributing such a calculating, manipulative course of behavior to a 17 year old girl is not particularly convincing, especially since from my own observation she seemed without cunning. His second alleged motive is that the accuser's family was intent on extracting money from him through the civil trial and settlement. This, too, seems unlikely, since the allegations were made about a year before filing the civil claim. Tr. at 46 ⁸ The contention that a 17 year old girl could contrive such a scheme or that her parents would induce her to participate in such a scheme is not convincing.

7/ He points to trial testimony and depositions by his wife and another step-daughter that he believes support his position that the accusations are false. I see nothing in those statements that suggests that the accuser was falsifying. In any event, the statements themselves, in my opinion, are entitled to very little weight. The witnesses were available and should have been brought forward. Since the witnesses were not before me, their credibility could not be tested. After the second segment of the hearing, the individual filed a statement signed by a second son, alleging some thoroughly inappropriate sexually-charged actions by the accuser. Similarly, since this son's statement is not subject to testing by examination and cross examination, I will give it no weight.

8/ A settlement of the civil charges did take place and the accuser and her family received a relatively modest sum. Tr. at 47, 95.

Criminal and Civil Charges

The individual also points out that no criminal charges were ever filed against him, and that the accuser's family did not prevail in the civil suit. He maintains this that this demonstrates that the accusations must therefore be untrue. This contention does not prevail in this security proceeding. In a civil suit the plaintiff must show by a preponderance of the evidence that she is entitled to prevail. In criminal cases, the State must show that the defendant is guilty beyond a reasonable doubt. The fact that the State decided not to proceed with a criminal case, and the fact that the accuser may not have shown by a preponderance of the evidence that she should prevail does not end my inquiry here. In personnel security cases, the individual must show he is clearly entitled to hold an access authorization. As discussed above, the individual has brought forward no convincing evidence to show that the accuser was lying in this case or even that she was generally an untruthful person or of untruthful character. Further, the individual never put forth any convincing motive for the step-granddaughter to make such serious false accusations.

Thus, ultimately, I find that the individual has brought forward no credible evidence to convince me that the security concern raised by the accusations has been resolved.

V. CONCLUSION

As the foregoing indicates, the individual has not resolved the Criterion L security concerns cited in the notification letter. It is therefore my decision that access authorization should not be restored in this case.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: November 10, 2005